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In the Supreme Court of the United States

No. 335

GEORGE NOBLE and WILLIAM NOBLE,
Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

No. 336

ROBERT W. HIGGINS, Jr., et al.,
Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

Supplemental Brief in Behalf of Respondent

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HARLOW PUBLISHING CORP., OKLAHOMA CITY

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Supplemental Brief in Behalf of Respondent

In the respondent's original brief, filed as a portion of the Response to the Petition for Writs of Certiorari, the respondent, as we believe, discussed every material question involved in these cases; and we believe that our position on all such issues is absolutely sound and fully sustained by the authorities. We now rely upon that brief. However, since filing that brief, we see where our argument relating to one of the most vital issues can be materially supplemented and very much strengthened

by calling the court's attention to some additional facts and authorities which we believe are absolutely conclusive on the question, and should be considered along with our original brief.

The character of title that the Choctaw Coal & Railway Company acquired by virtue of the Acts of Congress granting the right-of-way, February 18, 1888, 25 Stats. 35, (R. 26) as amended by the Act of February 13, 1889, 25 Stats. 668, (R. 32) is a very vital question.

It will be remembered that the petitioners claim that these Acts of Congress were not a grant in praesenti of a right-of-way to the Choctaw Coal & Railway Company. On the other hand, the respondent contends that these Acts constituted a Grant in praesenti of a right-of-way; and, also further contends that even if it should be held that the above mentioned Acts of Congress were not a grant in praesenti, of a right-of-way, still the Act of Congress of March 2, 1889, 25 Stats. 980, authorizing the Country to be opened to White settlement and reserving railroad rights-of-way was sufficient within itself to grant the right-of-way to the Choctaw Coal & Railway Company. We discussed this question in our original brief, beginning at page 16 and continuing to page 29 thereof, under what we designated "First Proposition," which is as follows:

"The Act of Congress of Feb. 18, 1888, as amended by the Act of Feb. 13, 1889, was a Grant in praesenti of a right-of-way to the Choctaw Coal & Railway Company."

It will be remembered that petitioners' contention that the Choctaw Coal & Railway Company was not granted

a right-of-way in praesenti is predicated upon their claim that the lands over which the right-of-way was granted were Indian lands and that by reason thereof the Congress of the United States had no authority to grant such a right-of-way. Notwithstanding that petitioners are in gross error as to their assertion that the Creek Tribe of Indians had title to the land in and about what is now Oklahoma City, at the time of the passage of said Acts, we call the court's attention to the following Treaty provisions relating to railroad rights-of-way.

On August 7th, 1856, 11 Stats. 699, 2 Kapp. 756, the Creek and Seminole Tribes of Indians and the United States entered into a Treaty relating to their lands, and it was specially provided in Art. 20 of said Treaty, as follows:

> "Article 20. The United States, or any incorporated company, shall have the right of way for railroads, or lines of telegraphs, through the Creek and Seminole countries; but in the case of any incorporated company, it shall have such right of way only upon such terms, and payment of such amount to the Creeks and Seminoles, as the case may be, as may be agreed upon between it and the national council thereof; or, in case of disagreement by making full compensation, not only to individual parties injured, but also to the tribe for the right of way, all damage and injury done to be ascertained and determined in such manner as the President of the United States shall direct."

On June 14, 1866, the United States and the Creek Tribe of Indians entered into a Treaty, 14 Stats. 785, (R. 52) whereby the United States procured title to all the Western portion of the Creek lands, including all the lands in and about Oklahoma City and the land involved

in the instant cases. The granting clause of said Treaty, as is set forth in Art. 3 thereof, is as follows:

> "In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks *hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon,* the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands being retained by them shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; * * *." (Italics supplied).

And Article 5 of the same Treaty contains the following provision:

> "The Creek Nation hereby grant a right-of-way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employees, shall be subject to the laws of the United States relating to intercourse with Indian tribes, * * *."

The above Treaty provisions conclusively show two things:

First, that the West half of the entire domain of the Creek Nation was ceded or granted to the United States by the Treaty dated June 14, 1866; and said "west half of the entire domain" included all lands in and about Oklahoma City. Attention is also called to the further

important fact that after the Treaty dated June 14, 1866, neither the Creek Indians nor any other people were ever permitted to settle upon or occupy any of the lands in and about Oklahoma City before the passage of the Act of March 2, 1889, authorizing the Country to be opened by Proclamation of the President, to White settlement.

Second, that the United States were fully vested with authority to grant railroad rights-of-way even across lands which the Creek Indians actually owned and occupied; and, of course the United States had the right without consulting anyone, to grant a right-of-way across the land that they had purchased from the Creek Indians under and by virtue of said Treaty of June 14, 1866. Also, it will be remembered that after the Treaty of June 14, 1866, the Creek Indians still owned the eastern portion of their lands and continued to own same until such lands were allotted in severalty under the laws of Congress.

By tracing the right-of-way granted by the Acts of Congress above mentioned, it will be observed that the right-of-way extended across a portion of the lands belonging to the Chickasaw and Choctaw Tribes of Indians, and by following the right-of-way granted in the Amendatory Act of Feb. 13, 1889, (R. 33), from Tobucksey County, Choctaw Nation (near what is now Haileyville, Oklahoma) "by the most feasible and practical route, to an intersection with the Atchison-Topeka & Santa Fe Railway, at the most convenient point between Halifax Station (now Goodwin in Ellis County, Oklahoma) and Ear Creek, otherwise known as the North Fork of the Canadian River," it will be observed that the right-of-way crossed a portion of the Choctaw Nation and extended through the lands still belonging to the Creek Nation

and then intersected the lands owned by the United States by virtue of the said Treaty of June 14, 1866. In this connection, attention is called to the further fact that at least two-thirds of the right-of-way thus described was on the land which had been ceded by the Creek Tribe of Indians to the United States under the last mentioned Treaty. In fact, this right-of-way extended from east to west almost entirely across what was later organized into Oklahoma Territory; and, at the time of the grant of right-of-way all of such lands were unoccupied and owned by the United States, except in a few instances where the United States had previously settled certain Indian Tribes. But, as above shown, at no time had the United States made any disposition of or permitted anyone to settle upon the lands in and about Oklahoma City before they were opened to White settlement.

After the United States had owned the land obtained from the Creek Tribe of Indians for about 19 years, without making use of any substantial portion of it, Congress came to the conclusion that it should be opened to white settlement. Preparatory to the opening of the country to white settlement, Congress on March 3, 1885, (23 Stats. 62), passed an Act authorizing negotiations with the Creek Tribe of Indians to effect a release of the restrictions as to the use which the United States might make of such lands.

As a result of the negotiations authorized by said Act, the United States entered into a Treaty with the Creek Indians, dated January 19, 1889, which was ratified and approved by the Creek Tribe January 31, 1889, and finally ratified by Congress March 1, 1889 (25 Stats. 757), which was the day before the Act was passed authorizing the country to be opened to white settlement. In

this last mentioned Treaty, the Creek Tribe relinquished and transferred to the United States all claim of every character to this western land and absolutely freed said land from all limitations or restrictions as to the use which might be made of it by the United States.

So, when the right-of-way Act of Feb. 18, 1888 as amended by Act of Feb. 13, 1889, was passed, Congress not only had the power under the Treaty provisions above mentioned to grant the right-of-way through the lands which were actually owned by the Creek Nation, but it actually owned and was preparing to open this western country in and about Oklahoma City to white settlement, and of course had the right to grant a right-of-way through such lands.

Ruddy v. *Rossi*, 248 U. S. 104, 63 L. Ed. 148.

We submit that in view of the above uncontroverted facts, laws of Congress and Treaty provisions, all the arguments of petitioners questioning the power of Congress to grant the right-of-way unquestionably falls, for there is no foundation, either in fact or in law, for such contention.

But the Choctaw Coal & Railway Company did not have to rely alone upon the Acts of Feb. 18, 1888 as amended by the Act of Feb. 13, 1889, for its right-of-way, for as above shown, on March 2, 1889, Congress passed an Act authorizing the opening of the country to white settlement; and, in that Act, rights-of-way and depot grounds previously granted to railroads were expressly reserved to railroads as more fully appears at page 24 of respondent's original brief; and, furthermore, Congress, on May 2, 1890, in what is commonly called the Organic Act, expressly reserved from the operation there-

of: "Rights-of-way and lands for stations heretofore granted to certain railroad corporations" as also more fully appears at page 25 of the same brief.

Even if Congress had been without authority to grant the right-of-way at the time the Choctaw Coal & Railway Company Acts were passed, which we submit is inconceivable under the circumstances, it most certainly had the power to grant such a right-of-way in the Act of March 2, 1889; and Congress certainly believed that there had been rights-of-way granted prior to the enactment of March 2, 1889, and the Act of May 2, 1890, or it would not have referred to said rights-of-way grants in said Acts. Furthermore, if Congress could not grant a right-of-way to the Choctaw Coal & Railway Company, for the reasons urged by the petitioners, it could not for the same reason grant a right-of-way to any other Railway Company. Consequently, if petitioners contentions should be true, when Congress was referring to right-of-way grants in the Acts of March 2, 1889, and May 2, 1890, it was making reference to a thing which in fact did not exist. Congress most certainly accepted the fact and believed that rights-of-way had been previously granted.

Even if the Creek Tribe of Indians had been vested with the title to this land, at the time of the passage of the Acts of Feb. 18, 1888, as amended by the Act of Feb. 13, 1889, still that fact would not prevent the Grant in praesenti of the right-of-way to the Choctaw Coal & Railway Company.

The decisions of this court fully sustain this Proposition. But inasmuch as the cases referred to conclusively answer a criticism made by the petitioners in their Reply

Brief, we shall refer to such criticism before citing the cases. At page 11 of said Reply Brief, petitioners say we did not quote all of Article 20 of the Creek and Seminole Treaty of August 7th, 1856, 11 Stats. 699. Their criticism is that we stopped short of the provision in the Treaty which required compensation to be "determined in such manner as the President of the United States should direct."

We have hereinbefore set forth all of said Article 20, but the fact that the Indian Tribe owned an interest in some of the lands over which the right-of-way was granted, and that said Article 20 provided that compensation should be made to the Indians, did not in the least militate against the fact that the Choctaw Coal & Railway Company was granted a right-of-way in praesenti; and, as above stated, this court has so held in a case where the facts were not nearly so favorable to that contention as in the instant cases. We have in mind *Spokane & British Coal & Railway Co.* v. *Washington & Great Northern Railway Co.*, 219 U. S. 166, 55 L. Ed. 159.

In that case Congress, June 4, 1898, 30 Stats. 430, granted to Washington Improvement & Development Co. a right-of-way for a railway through the Colville Indian Reservation; and the Act granting the right-of-way provided in Section 2 thereof, as follows:

> "That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid to any Indian Allottees whose lands may be taken by said Company under this Act and to provide the time and manner of payment thereof."

It will be observed that the Colville Indians were even allottees and actually lived on the land over which the right-of-way was granted, but notwithstanding this situa-

tion, this court held in the case just cited that the Act of Congress conveyed to the Company an estate in praesenti.

In *Butts* v. *Northern Pac. R. R. Co.*, 119 U. S. 55, 30 L. Ed. 330, the court had before it an Act of Congress approved July 2, 1864, 13 Stats. 365, granting certain lands to which the Indians had title to the Northern Pacific R. R. Co., and the court held that notwithstanding that the title was in the Indians at the time of the passage of the Act, it constituted a conveyance of an estate in praesenti. One of the head notes in the case prepared by MR. JUSTICE FIELDS is as follows;

> "The grant by the Act of Congress of July 2, 1864, to the Northern Pacific Railroad Company, of lands to which the Indian title had not been extinguished operated to convey the fee to the Company, subject to the right of occupancy by the Indians."

The fact that the Choctaw Coal & Railway Company Acts designated who should be paid compensation shows conclusively that Congress did not intend for the Railway Company to pay compensation to others than those specified.

This proposition is amply sustained by the following cases: In *City of Reno* v. *Southern Pac. Co.*, 268 Fed. 751, the court had under consideration a right-of-way grant which made no provision for compensating those who had previously settled upon the public lands over which the right-of-way was granted and the court in holding that inasmuch as no provision had been made for compensating such settlers they were not entitled to claim anything from the Railroad Company. In discussing the

question the court used the following language, at page 760 of the opinion:

> "The Act of 1862, was silent as to any method under which possessory claims of settlers could be condemned or acquired by the Railroad Company * * *. There were no rights which the Government was under obligation to recognize, if, in the opinion of Congress public welfare required disposition without relation to possible claims of settlers."

And in support of this language the court cited *St. Jos. & Denver Co.* v. *Baldwin*, 103 U. S. 426, 26 L. Ed. 578. In fact the decision of the Ninth Circuit Court of Appeals in *City of Reno* v. *Southern Pac. Co., supra,* furnishes a very illuminating review of many of the leading cases on rights-of-way granted by Congress.

And the Ninth Circuit Court of Appeals in *U. S.* v. *Hanson,* 167 Fed. 881, held substantially the same as the case last cited. See also *Union Pac. Ry. Co.* v. *Douglas Co.,* 31 Fed. 540.

Furthermore, when it is recalled that a special Act of Congress granting a right-of-way between fixed termini to a Railroad Company operates as a law as well as a transfer of property as held in *Schulenberg* v. *Harriman,* 21 Wall. 44, 22 L. Ed. 555; *M. K. & T. R. R. Co.* v. *Kans. Pac. R. Co.,* 97 U. S. 491, 24 L. Ed. 1095; *U. S.* v. *So. Pac. R. R. Co,* 146 U. S. 570, 36 L. Ed. 1091; *Bybee* v. *Oregon S. L. Co.,* 26 Fed. 586, 139 U. S. 663, 35 L. Ed. 305, and other cases, we can not conceive how new terms can be engrafted into the contract with the Choctaw Coal & Railway Company so as to require it to compensate others than the Indian occupants as specified in the grant.

It will be remembered that the Choctaw Coal & Ry. Co.

fully complied with the Act of Congress, but petitioners are not willing to let the railway company stand on the terms of the Act granting it the right-of-way. But, after those particularly designated in the Choctaw Coal & Railway Company right-of-way Act as being entitled to the compensation have been either paid or eliminated, petitioners insist that the railway company should be required to discharge other and additional burdens than those specifically placed upon it by the Act itself. However, petitioners cite no case which sustains their contention, in this regard.

By the very terms of the Act itself, the Choctaw Coal & Railway Company was only required to pay damages to the Indian Tribe or Nation through whose territory it ran, and "to any individual occupant according to the laws, customs and usages of any of the Indian Nations or Tribes" whose possessory rights and improvements might be injured and damaged in the construction of said road.

The Choctaw Act does not provide any compensation to the United States although the United States owned the title to the major portion of the land, over which the right-of-way was granted and particularly the land in and about Oklahoma City, and owned a substantial interest in the rest of the land through which the right-of-way was granted. Nor, did the Act provide that any person who should subsequently be permitted to enter into the country, as the ancestors of petitioners in the instant cases, should receive compensation for the land or improvements thereon over which the railroad company desired to locate its line. We believe that only one conclusion can be drawn from this silence in the Act, and that is, that the Congress of the United States intended

to grant a free and unconditional right-of-way to the Choctaw Coal & Railway Company as it had done in hundreds of other instances, save and except where such right-of-way affected Indian rights, and in such cases the railway company was required to make compensation for such Indian rights and no others. We believe that this conclusion is not only justified from the terms and provisions of the Act itself, as interpreted in the light of subsequent Acts of Congress herein before discussed, but that this conclusion is strongly supported by the many decisions of this court involving right-of-way grants.

All the court decisions relating to the interpretation of the Choctaw Coal & Railway Company act involved in the instant cases have been called to the attention of the court. We are not advised as to how much consideration this court gives to opinions of the Department of the Interior of the United States, but on March 27th, 1934, the Department of the Interior had before it for consideration, and rendered an opinion on a question which called for the interpretation of this same Choctaw Coal and Railway Company right-of-way grant as the same related to the right-of-way across a quarter section of land immediately east of and adjoining the quarter section of land in which the property involved in this litigation is located; and the construction which was placed upon that right-of-way grant by the Department of the Interior is in perfect accord with respondent's contentions in the instant cases, and the opinion of the Supreme Court of the State of Oklahoma attacked herein.

Inasmuch as we are not advised as to whether this opinion is in any published report, we shall set forth the entire opinion as an appendix to this brief, for the

court's inspection. However, at this time we desire to call the court's special attention to a certain portion of the opinion, as follows:

> "The act of February 18, 1888, granting the right of way 100 feet in width to the Choctaw Coal and Railway Company was a *special grant similar to other special grants of railroad rights of way, which have been held to be grants in praesenti, effective at the date of the granting act, so that adverse claims initiated subsequent to the granting act, but prior to the filing of the map of definite location or construction of the road, do not affect the rights of the railroad grantee.* See St. Joseph and Denver City Railroad Company v. Baldwin, (103 U. S. 426); Bybe v. Oregon and California Railroad Co. (139 U. S. 663); Northern Pacific Railway Company v. Ely (197 U. S. 1). For other Federal cases see 50 C. J. Sec. 427. The Supreme Court of Oklahoma has held the grant under consideration was a grant in praesenti and that title vested in the grantee at the date of the act. United States v. Choctaw, O. & G. Co. (41 Pac. 729); Churchill v. Choctaw Ry. Co. (46 Pac. 503).
>
> "As to the nature of the estate acquired by the grantee in the right of way, the Supreme Court has held, in accordance with its construction of other grants of rights of way under the public land laws for railroad purposes, that the railroad's interest is 'neither a mere easement, nor a fee simple absolute, but a limited fee, made on the implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee;' that 'in effect, the railroad is the absolute owner of the land.' Choctaw, O. & G. R. R. Co. v. Mackey (256 U. S. 531, 538). The subsequent reservation for military pur-

poses therefore did not affect the rights of the railroad grantee.

"The grant created a possibility of reversion in the Indians, but inasmuch as it is a matter of public history that the Indian title was extinguished as to the area involved here by treaty of *January* 19, 1889, *with the Creeks and Act of March* 1, 1889 (25 Stat. 757), *we may assume that the right of reversion passed to the United States.*"

* * * * *

"With respect to the 100-foot strip in the right of way under the grant of 1888, as previously stated, a possibility of reversion of title to the United States was created by operation of law. The Department held in E. A. Crandall (43 L. D. 536) that the issuance of patent for land traversed by a right of way granted under the Act of March 3, 1875 (18 Stats. 482), carries no interest in the right of way and upon abandonment or forfeiture thereof, *the legal title reverts to the United States.* This doctrine is affirmed in the cases of *Windsor Reservoir and Canal Company* (51 L. D. 27, 305) A. Otis Birch and M. Estelle Birch. (On Rehearing) (53 L. D. 340)"

* * * *

"It will be observed, however, that the doctrine that entry or patent to the land over which the right of way passes carries no rights in the possibility of reverter, rests upon the principles announced by the Supreme Court, *that land embraced in a valid right of way grant is no longer subject to sale or disposal under the mineral or other public land laws, and therefore the Department is without authority to permit the acquisition of rights by others in such rights of way.*" (Italics supplied).

* * * *

In the light of the above facts and authorities, we

are forced to the conclusion that the decision of the Court in *Churchill* v. *Choctaw Coal & Railway Company*, 4 Okla. 462, 46 Pac. 503, and *U. S. Ex rel. Search* v. *Choctaw Ok. & G. Ry. Co.*, 3 Okla. 404, 41 P. 729, as followed in the opinion of the Supreme Court of the State of Oklahoma in the instant cases correctly state the law; all of which we believe are in accord with *Mackey, County Treasurer* v. *Choctaw, Oklahoma & Gulf R. Co.*, 256 U. S. 531, 65 L. Ed. 1076, decided by this court, and are not subject to successful attack.

CORRECTION OF ERROR IN RESPONDENT'S ORIGINAL BRIEF

In our discussion of the Act of March 8, 1922, 42 Stats. 414, which provides that upon the abandonment of railroad rights-of-way granted by Congress, in Municipalities, the title to such abandoned rights-of-way shall vest in the municipality, we inadvertently stated at the top of pages 54 and 56 of said brief, that the statute provided that it should go to such municipality "for park purposes." In this we were in error, as the Act is silent on the purpose for which the municipality takes the title.

ADDITIONAL REASONS FOR DENYING RELIEF IN HIGGINS CASE

Petitioners at the outset of their Reply Brief have much to say with reference to our position on the non-federal question involved in the Higgins case, predicated on a deed of absolute conveyance made by ancestor Higgins and his wife to the Railway Company. (R. 152) This

deed was pleaded and proven by Petitioners at the trial (R. 176) in the State District Court. While we believe it will serve no useful purpose here to indulge in an extended discussion as to the pleadings in the State Court, yet it is only fair to say that the technical objections raised in the reply brief regarding those pleadings have been made here, for the first time.

Petitioners know, and the Record so shows, that this case was presented and tried in both the District Court and the Supreme Court of the State of Oklahoma upon the theory that there were two main questions involved in the case. First, did R. W. Higgins, the homesteader and ancestor of petitioners, acquire any interest in this strip of land over which the Railroad was constructed, by virtue of his patent? and, second, if he did acquire such interest, did the deed executed by him and his wife, to the Railway Company, convey the absolute fee to the Railway Company?

The Petitioners contended that the Railway Company acquired no rights in the land by the right-of-way Act of Congress and that the patent from the United States to the said R. W. Higgins conveyed the absolute fee simple title to the entire Quarter-section of land including the right-of-way of the Railway Company, and that the deed which was executed by the said Higgins to the Railway Company only conveyed an easement to the Railway Company so long as the Railway Company used and occupied the land for right-of-way purposes.

The respondent contended in both of the State Courts first, that the said R. W. Higgins never took any interest whatsoever in the strip of land over which the railroad was constructed, by virtue of his patent; and that therefore, the railway company did not acquire title to the strip

of land occupied by it by virtue of this deed, but by the Acts of Congress. And second, it was contended that in the event the respondent should be in error as to this, and it should be held that Higgins actually took title by his patent to the strip of land over which the railroad was constructed, then the deed executed by R. W. Higgins and his wife conveyed all the title which they had to the Railway Company; and that the Railway Company in turn by and through the deed executed by it, passed that title on to the respondent, which now owns and occupies the land. No attempt was made in either of the Courts to show that the pleadings did not clearly present these issues upon which the case was tried.

Even if we should not prevail in these cases on the federal question, we do not apprehend that this Court would say anything in its opinion in the Higgins case which would in any wise prejudice or preclude respondent from having its rights fully tried and determined in the State Court upon the non-federal question.

On the face of the record it is clear that the Petitioner in the Higgins case should not prevail upon the State question. This is an ejectment action and a suit to quiet title, and such an action is predicated on petitioners' right to recover in ejectment. It is elementary that a plaintiff in an ejectment suit must recover on the strength of his own title and not on the weakness of that of his adversary's.

McCormack v. *Stonebraker*, 133 Okla. 34, 270 Pac. 1098;
Simmons v. *Jacobs*, 113 Okla. 278, 241 P. 768;
Fairfax v. *Hunter*, 7 Cranch. 603, 3 L. Ed. 453;
Harcourt v. *Gaillard*, 12 Wheat, 523, 6 L. Ed. 716.

In this connection it will be borne in mind that the

petitioners in the Higgins case not only pleaded but introduced in evidence, as we have herein before shown, the deed from their ancestors by which they parted with all right, title and interest in the land involved to the Railway Company; and attention is called to the further fact that under the laws in effect in Oklahoma Territory, at the time of the execution of this deed, railroad companies took absolute fee title by virtue of such deeds.

Marland v. *Gillespie*, 168 Okla. 376, 33 P. (2nd) 207;

Oklahoma City v. *Dobbins*, ___ Okla. ___, 44 Pac. (2nd) 148.

And it will be remembered that the last above cited case was a companion case to the Higgins case and it was decided on the same day that the Supreme Court rendered its decision upon which this appeal is predicated. We discussed the cases last above cited at length in our original brief at pages 9 and 10 thereof.

We submit that upon a consideration of the entire record, and the authorities cited in this and in our original brief, the opinion and judgment of the State Supreme Court should be affirmed in both of these cases.

Respectfully submitted,

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APPENDIX

March 27, 1934.

ABILENE OIL COMPANY

vs.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.

G. L. O. 04623.
Guthrie 013958.

Grant to Oklahoma City Held to convey all interest of the United States in the tract described in the grant.

SUBMITTED BY THE GENERAL LAND OFFICE

The Commissioner of the General Land Office has submitted for approval his opinion that the oil and gas deposits underlying that part of the SW¼ Sec. 34, T. 12 N., R. 3 W., I. M., Oklahoma, and within the City of Oklahoma, embraced in certain grants of rights-of-way for railroad purposes to the Choctaw Coal and Railway Company are subject to the operation of the Act of May 21, 1930 (46 Stat. 373), and that a pending application of the Choctaw, Oklahoma and Gulf Railroad Company, the successor in interest to the Choctaw Coal and Railway Company, for a lease under said act may be entertained.

The tract in question consists of a strip of land 300

feet wide, extending from the east to the west boundary of the aforesaid quarter-section.

The Abilene Oil Company, claiming oil and gas rights in the land derived from the City of Oklahoma was permitted by the Department to file objections in the nature of a protest against the application, and response thereto has been made by the applicant company.

The facts relating to the status of title appear to be as follows: By Act of February 18, 1888 (25 Stat. 35), Congress granted a right of way in the Indian Territory to the Choctaw Coal and Railway Company. Map of definite location of the line of road was filed July 8, and approved July 11, 1889. The map showed the right-of-way as traversing the SW¼ Sec. 34 in question, and according to the map filed with the record, having a width in that section of 100 feet. The act of August 24, 1894 (28 Stat. 502), authorized reorganization of the company as the Choctaw, Oklahoma and Gulf Railway Company. Section 2 of the original grant provided that "when any portion thereof shall cease to be used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken." The Chicago, Rock Island & Pacific Railway now operates the right of way as part of its transcontinental line under a lease. By executive order of April 20, 1889, which, it will be observed, was subsequent to the date of the grant, the SW¼ of Sec. 34 was withdrawn from settlement, filing or entry and reserved for military purposes under the control of the War Department. On June 8, 1891, a license was granted by the Acting Secretary of War to the railroad company revocable at will "to enter upon and use for sidings and station purposes land adjoining its right-of-way," through the reservation on either or both sides of the company's

right-of-way, not exceeding in all 200 feet in width and in length extending across the reservation. The company's blue print shows that it took under this license a strip 200 feet wide extending across the reservation adjoining the south boundary of the previously granted right-of-way. On July 26, 1892, the War Department issued a similar license to the railway company to enable it to make advantageous connections with the Atchison, Topeka and Santa Fe Railroad, embracing two tracts of additional land in the reservation of 1.3 and 1.1 acres, respectively. By Executive order of September 28, 1892, the SW¼ of Sec. 34 was transferred to the Interior Department for disposition either under existing law or under subsequent enactments being no longer required for military purposes.

By the Act of August 8, 1894 (28 Stat. 264), the military reservation was granted to Oklahoma City, the scope and effect of which will be hereinafter considered.

The Abilene Oil Company alleges the survey, platting and lotting of the land as required by the grant, the discovery of oil in Oklahoma City in 1928, the present existence therein of approximately 300 wells, the passage of a zoning ordinance limiting and restricting the area in which drilling for oil and/or gas might be done, the inclusion of the area in question in a drilling zone, the claim of the city to the oil and gas rights under the 300-foot strip used as a right-of-way and its division into two permit areas to each of which there has been attached a small area adjacent to the right-of-way, the latter for the purpose of drilling. The Abilene Oil Company claims as assignee of a lease from the city, covering a portion of the 300-foot strip, and a 30-foot strip immediately adjacent thereto on the south. It alleges that permission

is given to drill two wells on the 30-foot strip and that one of such wells is completed and is now producing. A producing well is also alleged to have been completed on the drilling area attached to the permit for the remainder of the 300-foot strip. Copies of the text of City Ordinance 3944 and forms of leases are presented in support of the assertion that further additional wells cannot be permitted without violation of the City Ordinance, and to show that the various owners of parcels of land in any drilling permit area are entitled to participate in royalties from the oil and gas produced therefrom in proportion to their acreage interest. It is argued that if the United States should own the oil and gas rights under the rights of way, its proper course is to assert its rights to the royalties under the present leases, rather than grant an oil and gas lease which would result in prolonged and expensive litigation.

The company advances two propositions:

> "Even if the United States should own the oil and gas rights under the Choctaw, Oklahoma & Gulf Railroad right-of-way, the application for a permit to drill on said right-of-way should be denied because all of said right-of-way is attached to drilling areas and is now sharing in the royalties produced through the wells drilled on said areas as other real property in the drilling zone in Oklahoma City."
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> "The United States do not own the oil and gas rights under the Choctaw, Oklahoma & Gulf Railroad right-of-way over the property involved."

If the second proposition is sound, it is decisive of the question whether the land is subject to the oil and gas application, and the first need not be considered. The Act of February 18, 1888, granting the right of way 100 feet in width to the Choctaw Coal and Railway Company

was a special grant similar to other special grants of railroad rights-of-way, which have been held to be grants in praesenti, effective at the date of the granting act, so that adverse claims initiated subsequent to the granting act, but prior to the filing of the map of definite location or construction of the road, do not affect the rights of the railroad grantee. See *St. Joseph and Denver City Railroad Company* v. *Baldwin* (103 U. S. 426); *Bybe* v. *Oregon and California Railroad Co.* (139 U. S. 663); *Northern Pacific Railway Company* v. *Ely* (197 U. S. 1). For other Federal cases see 50 *C. J.*, Sec. 427. The Supreme Court of Oklahoma has held the grant under consideration was a grant in praesenti and that title vested in the grantee at the date of the act. *United States* v. *Choctaw, O. & G. Co.* (41 Pac. 729); *Churchill* v. *Choctaw Ry. Co.* (46 Pac. 503).

As to the nature of the estate acquired by the grantee in the right-of-way, the Supreme Court has held, in accordance with its construction of other grants of rights of way under the public land laws for railroad purposes, that the railroad's interest is "neither a mere easement, nor a fee simple absolute, but a limited fee, made on the implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies attending the fee;" that "in effect, the railroad is the absolute owner of the land." *Choctaw, O. & G. R. R. Co.* v. *Mackey* (256 U. S. 531, 538). The subsequent reservation for military purposes therefore did not affect the rights of the railroad grantee.

The grant created a possibility of reversion in the Indians, but inasmuch as it is a matter of public history that the Indian title was extinguished as to the area in-

volved here by treaty of January 19, 1889, with the Creeks and Act of March 1, 1889 (25 Stat. 757), we may assume that the right of reversion passed to the United States.

The interest of the United States in the SW¼ of Sec. 34 on August 8, 1894, the date of the grant to the City of Oklahoma, was a fee simple absolute in all thereof saving the 100-foot right of way in which it had a mere possibility of a reversion as above defined. The permits issued by the Secretary of War for the use of the adjacent lands by the railroad were not definite or permanent relinquishments of the property, and conferred no right of user after the War Department had lost its right to use the land for military purposes (36 Op. Atty. Gen. 500). The railroad company if so using the land after its transfer to the Interior Department did so by sufferance.

The question is therefore presented to what extent did the grant to the city divest the United States of its interest and estate in the SW¼ Sec. 34. This question will first be considered as to the parcels of land within the permits issued by the Secretary of War, and second, as to the interest of the United States in the right-of-way acquired under the Act of 1888. The question is confined to these areas mentioned for it is not contended, either by the applicant or the Commissioner that an absolute fee simple title did not vest in the city for the remainder of the quarter-section.

The first section of the Act of 1894 reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That the abandoned military reservation at Oklahoma City, in Oklahoma Territory, comprising the southwest quarter of section thirty-

four, township twelve north, of range three west, is hereby granted to said Oklahoma City in trust for the use and benefit of its public free schools, to be used and applied for the benefit of all children of said city of scholastic age without distinction of race, except such portions of said reservation as are reserved for the purposes and uses hereinafter described."

Reading the language in its natural and ordinary meaning, it would seem that the word "except" therein, qualifies and creates an exception from the phrase immediately preceding it, namely, "to be used and applied for the benefit of all children of said city of scholastic age without distinction of race," and not the words "hereby granted." In other words, it was the intend to carve, not out of the grant, but out of the trust for public schools "certain portions of the reservation as are reserved for the purposes and uses hereinafter described." If any doubt arises from the language thus far quoted, as to whether there was any reservation or exception in favor of the United States, it seems clearly dispelled by the description of the reservations in the second section of the act, which reads as follows:

"That not less than ten acres of said reservation shall be set apart and used for said city for the location of public buildings and for a public park. That within ninety days after the passage of this Act the Southern Kansas Railway Company shall have the right to purchase from said city, adjoining said company's present right of way, for depot grounds and other railroad purposes, not to exceed six acres of said reservation, the value thereof and the price to be paid therefor to be fixed by the appraisers to be appointed by the Secretary of the Interior within said ninety days. That the permits

heretofore granted to the Choctaw Coal and Railroad Company by the Secretary of War for lands across and upon said reservation, shall remain in force until such time as the land so granted shall cease to be used for railroad purposes, when the same shall pass to the city."

In this section there is no room for the construction that a reservation or a reversion in title was made in favor of the grantor.

There are three reservations, namely: (1) not less than ten acres for public buildings and a public park. This plainly is not a reservation of title, but a reservation from the benefit of the trust for the use of public schools. (2) The Southern Kansas Railway Company is given the right to purchase not to exceed six acres adjacent to its right of way *"from said city."* This also is plainly no reservation of title, but a right in the railroad to obtain title from the grantee. (3) "The permits heretofore granted * * * the Secretary of War * * * shall remain in force, until the land so granted (under permits) shall cease to be used for railroad purposes, *when the same shall pass to the city."* (Emphasis supplied.)

Considering the precarious tenure under which the railroad held possession of the permit areas at the time of the grant to the city, it does not seem that the last reservation had any other purpose than as expressed in the act to provide that the permits should remain in force, conditioned upon the continuous use of the land for railroad purposes. It was to protect the railroad from ouster by the city. There is nothing incompatible with the grant of title in fee to the city, as expressed in the first section, with the reservation of such posses-

sory right in favor of the railroad company. While the words "when the same" (meaning the land) shall pass to the city, if taken alone might import a retention of fee in the grantor, yet when the entire intent is gathered from the four corners of the statute, it seems plain that what is meant is, that the use and possession should pass to the city upon the cessation of use for railroad purposes. It might be argued that by changing the tenure of the permit and adding the attributes of perpetuity and exclusiveness to the railroad's estate, thereby a limited or base fee was vested in the railroad company similar to like grants under general public land laws. Assuming that were true, it does not help the position of the applicant company. The words creating an estate over in the city in the nature of conditional limitation destroyed any possibility of the United States having the fee again. There was, therefore, no interest left in the United States, subject to grant under the Act of May 21, 1930, *supra*, in the permit areas.

With respect to the 100-foot strip in the right-of-way under the grant of 1888, as previously stated, a possibility of reversion of title to the United States was created by operation of law. The Department held in *E. A. Crandall* (43 L. D. 536) that the issuance of patent for land traversed by a right-of-way granted under the Act of March 3, 1875 (18 Stat. 482), carries no interest in the right-of-way and upon abandonment or forfeiture thereof, the legal title reverts to the United States. This doctrine is affirmed in the cases of *Windsor Reservoir and Canal Company* (51 L. D. 27, 305). *A. Otis Birch and M. Estelle Birch* (On Rehearing) (53 L. D. 340).

In the last case cited, the right to require competitive bids between a railroad applicant for lease under the

Act of May 21, 1930, *supra,* and abutting owners respecting the royalties they would agree to pay for the extraction of oil and gas under a railroad right of way was upheld, as against the claim of a patentee of adjacent land, under the mining law.

Reviewing the previous decisions of the courts and the Department, it was there held, that the prior right of way was as much eliminated from the mineral patent as it would have been if excepted therein by description; that the owner of the right-of-way had no right to the minerals therein by virtue of its grant, and that the land in the right of way was not subject to mining location, though mineral land: That the acts of February 25, 1909 (35 Stat. 647), and March 8, 1922 (42 Stat. 414), purporting to vest title in the holders of the land traversed by the right-of-way in the event of forfeiture or abandonment thereof,—the last named act reserving all minerals to the United States,—were predicated on the assumption that upon extinguishment of the right-of-way, the United States resumed full title, that the act of May 21, 1930, was an extension of the rights of the railroad grantee by granting him mining rights.

It will be observed, however, that the doctrine that entry or patent to the land over which the right-of-way passes carries no rights in the possibility of reverter, rests upon the principles announced by the Supreme Court, that land embraced in a valid right of way grant is no longer subject to sale or disposal under the mineral or other public land laws, and therefore the Department is without authority to permit the acquisition of rights by others in such rights of way. It does not follow from this, as the Commissioner concedes, that if any interest contingent or expectant continues in the United States,

Congress may not dispose of it. In fact it has exercised such authority by providing in the acts last above cited that upon abandonment or forfeiture of the grant the title shall inure to the holders of the land traversed by the right of way. The Commissioner is of the opinion that if the possibility of reverter in the right-of-way was intended to be granted, express mention of it would have been made of it in the grant. He applies the rule that legislative grants should be construed in favor of the public, and whatever is not granted in clear and explicit language is withheld. But the grant here in question purported to convey the entire SW¼, and was broad enough to comprehend any interest the United States had in the land. The test should rather be whether the deed of grant manifested any intention to exclude the possibility of reverter in the right of-way. *Roxana Petroleum Corporation* v. *Sutter et al.* (28 Fed. (2d) 159, 162). It is not irrelevant to consider that at the time this grant was made there was no knowledge or well-grounded belief that the land was valuable for oil, and a reversion of title was doubtless regarded as remote, if not improbable. The intention of Congress is not to be gauged by subsequent events. So far as the grant purported to convey the title and estate of the railroad grantee, it was without effect. The city took the land subject to the right of way. *Stalker* v. *Oregon Short Line Railroad Company* (225 U. S. 142); *Rio Grande Western Railway* v. *Stringham* (239 U. S. 44). But this result arises by operation of law and not by the terms of the grant. In the latter there is not a word or phrase which could be used as a basis for the contention that the United States excepted any land or reserved any rights in itself. It is the judgment of the Department that

the grant to the city divested the United States of all the interest it had in the land. The rule of construction invoked by the Commissioner does not justify the withholding of that which satisfactorily appears to have been conveyed in the grant. *Russell* v. *Sebastian* (233 U. S. 195). It follows that the Act of May 21, 1930, *supra,* has no application, and the application of the Choctaw, Oklahoma and Gulf Railroad Company should be denied.

(Sgd.) T. A. WALTERS,

First Assistant Secretary.